UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. UBS AMERICAS, INC., et al., Defendants.	11 Civ. 5201 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. JPMORGAN CHASE & CO., et al., Defendants.	11 Civ. 6188 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. HSBC NORTH AMERICA HOLDINGS, INC., et al., Defendants.	11 Civ. 6189 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. BARCLAYS BANK PLC, et al., Defendants.	11 Civ. 6190 (DLC)

FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. DEUTSCHE BANK AG, et al., Defendants.	11 Civ. 6192 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. FIRST HORIZON NATIONAL CORP., et al., Defendants.	11 Civ. 6193 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. BANK OF AMERICA CORP., et al., Defendants.	11 Civ. 6195 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. CITIGROUP INC., et al., Defendants.	11 Civ. 6196 (DLC)

FEDERAL HOUSING FINANCE AGENCY, etc.,

Plaintiff,

v.

GOLDMAN, SACHS & CO., et al.,

Defendants.

11 Civ. 6198 (DLC)

FEDERAL HOUSING FINANCE AGENCY, etc.,

Plaintiff,

v.

CREDIT SUISSE HOLDINGS (USA), INC., et al.,

Defendants.

11 Civ. 6200 (DLC)

FEDERAL HOUSING FINANCE AGENCY, etc.,

Plaintiff,

v.

NOMURA HOLDING AMERICA, INC., et al.,

Defendants.

11 Civ. 6201 (DLC)

FEDERAL HOUSING FINANCE AGENCY, etc.,

Plaintiff,

v.

MERRILL LYNCH & CO., INC., et al.,

Defendants.

11 Civ. 6202(DLC)

FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. SG AMERICAS, INC., et al., Defendants.	11 Civ. 6203 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. MORGAN STANLEY, et al., Defendants.	11 Civ. 6739 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. ALLY FINANCIAL INC., et al., Defendants.	11 Civ. 7010 (DLC)
FEDERAL HOUSING FINANCE AGENCY, etc., Plaintiff, v. GENERAL ELECTRIC COMPANY, et al., Defendants.	11 Civ. 7048 (DLC)

DEFENDANTS' REQUEST FOR CLARIFICATION REGARDING THE COURT'S PRIOR RULINGS AS TO THE PROTECTIVE ORDER

Plaintiff and Defendants have met and conferred to finalize the Protective Order in accordance with this Court's directions at the May 14 conference, and the parties have agreed on final wording for most provisions. The parties disagree, however, concerning implementation of an aspect of this Court's May 14 ruling, about which Defendants respectfully seek this Court's guidance:

> Beyond the rights section 7.4 otherwise provides all parties, did the Court intend to limit FHFA to sharing Defendants' "Highly Confidential Material" to (a) a total of five employees or subject matter experts or (b) five subject matter experts plus all individuals in the FHFA Office of the Director, the Division of Enterprise Regulation, the Division of Examination Programs and Support, the Office of Conservatorship Operations, and the Supervision Committee?

Defendants understand the answer to the question is "(a)." FHFA advises it disagrees.

I. The Parties' Respective April 26, 2012 Proposals.

The first portion of section 7.4(a), as to which all parties are in agreement, states:

> Unless otherwise ordered by the Court or permitted in writing by the Designating Party, material designated "HIGHLY CONFIDENTIAL" may be disclosed only to the following persons:
>
> (a) any person permitted to receive Confidential Material identified in paragraph 7.3, except that Highly Confidential Material shall not be disclosed, summarized, described, characterized, or otherwise communicated to (i) any current or former director, officer, or employee of the Receiving Party other than Receiving Party's Counsel, (ii) any current or former director, officer, or employee of any other Party to the Action(s) other than Counsel for any other Parties to the Action(s); or (iii) any current or former director, officer, or employee of Fannie Mae or Freddie Mac other than Fannie Mae or Freddie Mac's Counsel.

See Ex. 1 to Defendants' April 26, 2012 Br. (Defendants' proposal) at § 7.4(a); Ex. 2 to Defendants' April 26, 2012 Br. (Plaintiff's proposal) at § 7.4(a) (emphases added) (the "Agreed-Upon Language"). In other words, the Agreed-Upon Language sets up a form of an "attorneys' eyes" designation for "Highly Confidential Material," reflecting the fact that such material is, by definition, competitively sensitive.[1]

FHFA proposes that, notwithstanding the attorneys-eyes designation reflected in the Agreed-Upon Language, a subsequent clause should be inserted granting FHFA a one-way, non-reciprocal right to distribute "Highly Confidential Material" to an unlimited number of FHFA employees. In its April 26, 2012 submission, Plaintiff proposed the following expansive language in section 7.4:

> Notwithstanding the foregoing [Agreed-Upon Language], Highly Confidential Material may be disclosed to (i) those FHFA employees in the Office of the Director, the Division of Enterprise Regulation, the Division of Examination Programs and Support, the Office of Conservatorship Operations, and the Supervision Committee to whom disclosure is necessary for the prosecution of an Action(s), and (ii) any other subject matter expert at a federal government or regulatory agency to whom the General Counsel of FHFA or his designee reasonably and in good faith believes that disclosure is necessary for the prosecution of an Action(s) or to carry out FHFA's regulatory function. For avoidance of doubt, the Parties understand and agree that Highly Confidential Material shall not be used for business advantage or competitive purposes.

See Ex. 2 to Defendants' April 26, 2012 Br. at ¶ 7.4(a).

In an effort to compromise, Defendants' April 26, 2012 submission proposed more limited language that in pertinent part provided that "Highly Confidential Material" could be shared with:

[1] By virtue of the incorporation of section 7.3 into section 7.4, the Agreed-Upon Language provides that certain additional non-attorneys such as court personnel, experts, and deponents would be permitted access to "Highly Confidential Material," but it expressly precludes access to employees of the Receiving Parties unless they are Counsel. *See id*.

> Up to five current employees of the Plaintiff, not including In-House Legal Personnel, as designated by Plaintiff's Counsel, who Plaintiff's Counsel have determined, in good faith, are necessary to assist Counsel in connection with an Action(s) and who have signed the "Agreement To Be Bound By Protective Order" (Exhibit A)[.]

See Ex. 1 to Defendants' April 26, 2012 Br. at ¶ 7.4(b)(i).

II. The May 14, 2012 Hearing and Subsequent Meet-and-Confer.

At the May 14 hearing, this dispute was addressed by the Court and counsel:

> [THE COURT:] And, finally, on the fourth issue, the FHFA's request that highly confidential material be shared with a limited group of subject matter experts in government service but outside the FHFA and I'm going to grant that in part. I'm going to grant it for the purpose of assisting the FHFA with the prosecution of these actions. I'm not going to grant it to the extent it's requested to assist the FHFA in carrying out its regulatory functions. And, Mr. Selendy, were you thinking of five individuals? Do you have a number that you were thinking of or a ballpark figure?
>
> MR. SELENDY: I believe we said five individuals. The idea was to confine it to a very small group that would allow us to permit the functions, including taking advantage of the expertise within FHFA while still respecting the desire for a limited sharing of confidential information.
>
> THE COURT: I'll grant the access to five people.
>
> MR. SELENDY: Thank you.
>
> MS. STEWART: Your Honor, I'm Beth Stewart from the Bank of America defendants. Just with respect to that, would it be possible that those five individuals be required to sign the undertaking that was appended to the protective order so that we would have notice of them? If it turns out those individuals seem to be people with access to competitive information defendants may want to raise that with the Court and if we don't know who they are we won't be able to do that.
>
> MR. SELENDY: Yes, we would agree to that.

Tr. of May 14, 2012 Hearing at 17-18 (emphases added).

Defendants understood that this Court had struck a compromise between the Parties' respective proposals, permitting FHFA to disclose Defendants' "Highly Confidential Material" to up to five persons—current employees or subject matter experts—so long as the disclosure is in furtherance of prosecution of the Actions, rather than pursuant to FHFA's regulatory function generally. Indeed, this is exactly how Mr. Selendy appeared to understand this Court's order. As noted above, Mr. Selendy stated at the conference that limiting disclosure of "Highly Confidential Material" to five individuals (including employees or non-employees) would be sufficient to permit FHFA, *inter alia*, to "tak[e] advantage of expertise within FHFA" while still limiting the sharing of confidential information. *Id*. FHFA now contends that while the Court limited it to five "subject matter experts," the Court implicitly granted Plaintiff's request to disclose Defendants' "Highly Confidential Material" to an unlimited number of employees in any of the five departments listed in Plaintiff's April 26, 2012 proposal. FHFA has agreed to inform Defendants of the identities of the five "subject matter experts," but takes the position that it is not required to disclose the identities of the employees in the five FHFA departments that receive "Highly Confidential Material."

Following the hearing, Defendants proposed to FHFA—and respectfully propose to this Court—that the revised section should read as follows to reflect the Court's ruling:

> Notwithstanding the foregoing, Highly Confidential Material may be disclosed to up to five current FHFA employees or subject matter experts at a federal government or regulatory agency to whom the General Counsel of FHFA or his designee reasonably and in good faith believes disclosure is necessary for the prosecution of the Action(s), subject to the further limitations that: (i) such person(s) shall sign the "Agreement to be Bound By Protective Order" (Exhibit A) prior to receipt of any Highly Confidential Material; and (ii) Plaintiff shall provide any such signed Agreement to Defendants within five (5) business days of its execution. For avoidance of doubt, the Parties understand and

> agree that Highly Confidential Material shall not be used for business advantage or competitive purposes.[2]

FHFA, by contrast, proposes the language should read:

> Notwithstanding the foregoing, Highly Confidential Material may be disclosed to (i) those FHFA employees in the Office of the Director, the Division of Enterprise Regulation, the Division of Examination Programs and Support, the Office of Conservatorship Operations, and the Supervision Committee to whom disclosure is necessary for the prosecution of an Action(s), and (ii) up to five subject matter experts at a federal government or regulatory agency to whom the General Counsel of FHFA or his designee reasonably and in good faith believes that disclosure is necessary for the prosecution of an Action(s), and, with respect to (ii), have signed the "Agreement To Be Bound By Protective Order" (Exhibit A) prior to receipt of any Highly Confidential Material. Plaintiff shall provide any such signed Exhibit A to Defendants within five (5) business days of execution. For avoidance of doubt, the Parties understand and agree that Highly Confidential Material shall not be used for business advantage or competitive purposes.

Attached hereto as Exhibit B is a comparison of Plaintiff's proposed Section 7.4 and Defendants' proposed Section 7.4.

III. Defendants' Proposed Language Should Prevail.

Defendants understood at the May 14 conference that this Court was limiting FHFA to sharing Defendants' Highly Confidential Material with no more than five persons, not (as Plaintiff insists) five "subject matter experts" plus any employee in FHFA's Office of the Director, the Division of Enterprise Regulation, the Division of Examination Programs and Support, the Office of Conservatorship Operations, and the Supervision Committee. Despite Defendants' repeated inquiries, FHFA has consistently declined to explain what these five Departments do, or how many individuals work in them, or why these individuals need access to

[2] A copy of Defendants' Revised Proposed Protective Order is attached as Exhibit A.

Defendants' "Highly Confidential Material" when the Agreed-Upon Language of the protective order otherwise prohibits access to non-attorney employees.

Defendants have a reasonable concern that FHFA employees may have access to information about the GSE's competitive posture, which would make it inappropriate for them also to have access to Defendants' competitively-sensitive information. *See* Brief of FHFA as Intervenor, *Herron v. Fannie Mae*, No. 10-cv-00943 (D.D.C. June 27, 2011) ("As conservator, FHFA is responsible for the overall management of the institutions and has delegated certain operational and other duties to the Enterprises' directors and officers as deemed appropriate." (quoting Statement of James B. Lockhart III, FHFA Director) (emphasis added)). For example, the specified individuals may have access to or involvement in the GSEs' "pricing, marketing, scheduling, or strategic planning" of their securitizations. *See United States v. Nw. Airlines Corp.*, No. 98-CV-74611, 1999 WL 34973961, at *5 (E.D. Mich. May 21, 1999).

Moreover, the very cases cited in FHFA's April 26 brief highlight the extraordinary breadth of FHFA's request. For example, in *Northwest Airlines Corp.*, 1999 WL 34973961, at *5 (quoted in Plaintiff's April 26, 2012 at 8), the Defendants sought the right to share highly confidential information with their in-house counsel (not even non-legal personnel, as FHFA here requests), and provided declarations regarding the in-house attorneys' roles in business decisions. The court rejected the request, noting the attorneys were in some instances "consulted concerning the legal implications" of "pricing, marketing, scheduling, or strategic planning." *Id.* at *5-6 (adopting provisions that would only allow access on specific motion). *See also Sullivan Mktg., Inc. v. Valassis Commc'ns., Inc.*, No. 93 CIV. 6350, 1994 WL 177795, at *3 (S.D.N.Y. May 5, 1994) (quoted in Plaintiff's April 26, 2012 Br. at 10) (rejecting request of Valassis for its General Counsel to be permitted to access competitively-sensitive information following court's

review of affidavit about his role, and noting "'[it] is very difficult for the human mind to selectively compartmentalize and suppress information once learned, no matter how well-intentioned the effort may be to do so.'" (quoting *F.T.C. v. Exxon Corp*., 636 F.2d 1336, 1350 (D.C. Cir. 1980))).

Here, FHFA asks for far more and offers far less in support. It has submitted no declarations. It seeks a one-sided right to share "Highly Confidential Material" beyond attorneys to employees, but it has failed to provide even the most basic information to Defendants about what the five specified FHFA departments do and how many people work in them and how that work furthers the prosecution of these actions as opposed to any regulatory function. Indeed, its position is that it should not even have to inform Defendants who the individuals in these five departments are, and that only the identities of "subject matter experts" need be disclosed. The Court should affirm its prior ruling and adopt Defendants' revised proposed language as reflected in the attached Exhibit A.

Dated: May 24, 2012

Respectfully submitted,

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